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No._____
IN THE SUPREME COURT OF THE UNITED STATES
October Term 1994

Robert Curley
Petitioner,

vs.

United States of America
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7th CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was the rejection of the following 2 jury instructions in a conspiracy case error: "A person who has no stake in a venture which has as its object the possession and distribution of drugs is not a conspirator of those who agreed to possess and distribute drugs. In order for the government to prove that a defendant was a conspirator with others who agreed to possess and distribute drugs, it is necessary for the government to prove beyond a reasonable doubt that such person's fortunes would rise or fall with the success or failure of that conspiracy." and,"A person is not a member of a conspiracy unless he has a stake in the venture. That is, unless he will profit by the achievement

of the conspiracy. A person who merely aids and abets conspirators is not a member of the conspiracy."

2. How should the conflict between the 2nd Circuit's holding in United States v. Falcone 109 F 2d 579, 581 (2d Cir. 1940) which held that an alleged conspirator "...must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders." 109 F 2d at 581 see also United States v. Zeuli 137 F 2d 845, 847 (2nd Cir. 1943) and United States v. Peoni 100 F 2d 401 (2nd Cir.1938) and the 7th Circuit's holding in this case United States v. Curley 55 F 3d 254 (7th

Cir. 1995) that a conspiracy defendant is not entitled to a "stake in the venture" instruction be resolved?

PARTIES

1. Robert Curley was defendant in the United States District Court for the Western District of Wisconsin, appellant in the United States Court of Appeals for the 7th Circuit and petitioner for Writ of Certiorari in this Court.

2. The United States of America was plaintiff in the United States District Court for the Western District of Wisconsin, appellee in the United States Court of Appeals for the 7th Circuit and respondent in this Court.

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DECISIONS BELOW

The judgment of the U.S. District Court is unpublished. The opinion of the United States Court of Appeals for the 7th Circuit affirming petitioner's conviction is reported at United States v. Curley 55 F 3d 254 (7th Cir. 1995) The judgment orders and the opinion are reproduced in the appendix to this petition.

JURISDICTION

On May 12, 1995 the United States Court of Appeals for the 7th Circuit filed a decision and entered a judgment affirming petitioner's conviction and sentence. No petition for rehearing was filed. Petitioner seeks to invoke this court's jurisdiction under 28 USC Sec. 1293 by filing this petition by mail on August 3, 1995 and within 90 days of the judgment of the Court of Appeals as required by rule 13.1 of the Court.

STATEMENT OF THE CASE

On August 4, 1993 a grand jury in the Western District of Wisconsin returned a 2 count indictment which charged: "Count 1. That between on or about November 1984 and on or about November 1988, the exact dates being unknown to the Grand Jury, in the Western District of Wisconsin and elsewhere, the defendants David Van Arsdale, Marcus Dorman and Robert W. Curley did knowingly and unlawfully conspire and agree with each other with Damien Connolly, John Connolly and with others, both known and unknown to the Grand Jury, to commit the following offenses against the United States. One, to unlawfully, knowingly and intentionally possess with intent to distribute marijuana, a Schedule I controlled substance, in violation of

Title 21, United States Code, Sections 841(a)(1) and 846. And, two, to unlawfully, knowingly and intentionally distribute marijuana as a Schedule I controlled substance in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

Count 2. That between on or about June 1, 1988 and August 12, 1988, in the Western District of Wisconsin and elsewhere, the defendants David Van Arsdale, Marcus Dorman and Robert W. Curley did knowingly and intentionally possess with intent to distribute marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code Section 841(a)(1) and Title 18, United States Code, Section 2." (tr. 3-141-142[transcript volume 3 pages 141 and 142])

During the trial the defendant asked that his proposed jury instructions 57 and 58 be given and the court refused the instructions. Defendant's instruction 57 reads:"A person who has no stake in a venture which has as its object the possession and distribution of drugs is not a conspirator of those who agreed to possess and distribute drugs. In order for the government to prove that a defendant was a conspirator with others who agreed to possess and distribute drugs, it is necessary for the government to prove beyond a reasonable doubt that such person's fortunes would rise or fall with the success or failure of that conspiracy." Defendant's instruction 58 reads:"A person is not a member of a conspiracy unless he has a stake in the venture. That is, unless

he will profit by the achievement of the conspiracy. A person who merely aids and abets conspirators is not a member of the conspiracy."

The jury returned a guilty verdict on the conspiracy count and a not guilty verdict on the possession with intent to distribute count.

The evidence at trial showed the following. Dawn Rexroat met Damien Connolly at the end of 1985 (tr.2-52) They became romantically involved. (tr.2-55) At first she thought that Damien was in the commercial real estate business (tr. 2-55). After she had known him for about 6 months she learned that he was involved in marijuana trafficking. (tr. 2-56) She moved in with him in the summer of 1986 (tr. 2-57). They lived with Tom Morgan on Mifflin Street in Madison. (tr.2-57-58)

Through Damien Dawn met his brother Desi, his parents, Tom Morgan and some of his friends from the St. Barts in the islands.(tr.2-58) In February Damien traveled to Thailand (tr.2-59). Damien told Dawn the purpose of the trip was for a vacation. (tr.2-59) He went with Fidelin Questell (tr.2-59) who was from St.Barts (tr.2-60). During that fist year Dawn did not go on trips with Damien except to Miami. (tr.2-60) About a year and a half after she met Damien she learned that he made his money from marijuana trafficking (tr.2-62). Through the course of her relationship with Damien she probably made six or seven trips. (tr.2-63) About a year after she learned about his marijuana activities she began to help him out with his trafficking activities (tr.2-64). She drove him places and took messages for

him (tr. 2-64).

Damien told Dawn he needed to go to St. Barts. (tr.2-67) He wanted to go there because he knew skippers who owned boats or who sailed boats.(tr.2-67) Dawn knew 2 or 3 of the skippers: Fidelin; a guy named Madness (Marc Dorman); and Diver.(tr. 2-67) Damien needed the skippers to sail boats to bring marijuana back to the United States from various places, mainly Jamaica.(tr.2-68) The boat would be loaded up and sailed back to the United States to a particular port in North Carolina, Beaufort, North Carolina.(tr.2-68)

Dawn recognized the defendant-appellant Bob Curley (tr.2-70). She met him briefly in 1987 when Curley stopped by her residence in Waunakee to see if Damien was there and identified himself by name. (tr 70-71) After that she saw

him on an infrequent basis (tr. 2-71). She knew the Curley lived in Dodgeville, WI (tr. 2-72). In the spring of 1988 she went with Damien to Curley's home to see his dogs (tr.2-73). She also saw Curley when she lived in Spring Green which is about 10 minutes from Dodgeville.(tr.2-74) She saw Curley infrequently. (tr.2-78)

In July 1988 Dawn provided assistance to Damien Connolly for his marijuana trafficking by carrying money to Jamaica. (tr.2-79) She went to Jamaica on July 7th and flew back July 11th (tr 2-79). He was in a desperate situation to get the money down to Jamaica and he needed it immediately and did not have anybody else to do it except Dawn.(tr 2-80) He was already in Jamaica. (tr.2-80)

Damien told Dawn that his reason he was traveling to Jamaica in early July was to make sure that the boat which he had obtained had arrived and to get the boat ready for sailing marijuana back to the United States.(tr.2-81) Before he went Damien said he had two possibilities of getting marijuana. (tr. 2-81) It was either Des [Desmond Cassidy (tr.2-122)] or Bob [Bob Curley (tr.2-82)] and Madness was going to sail the boat.(tr 2-81)

Dawn did not have any contact with Bob Curley in Madison before she traveled to Jamaica. (tr.2-82)

Dawn remembers the circumstances under which she received the money to take to Damien Connolly (tr.2-82). The money was at John Connolly's apartment when she arrived. A friend of hers, Mary Brunchorst, taped the money on Dawn's

legs and she had on a skirt and then took the money to Jamaica.(tr.2-82) Randy Freidel was also in John Connolly's apartment that day. (tr.2-83) Randy was there to visit Mary Brunchorst (tr. 2-84).

Dawn flew to Jamaica alone. (tr.2-86) When she got to the airport Damien picked her up and they went to a hotel. (tr.2-87) It was late at night probably close to midnight. (tr. 2-87) Dawn does not remember the name of the place where she and Damien stayed that night. (tr.2-87) Dawn says that Bob Curley was in another bedroom in the hotel room asleep. (tr.2-87-88) Dawn gave the money to Damien in the bathroom of the hotel room. (tr. 2-88) Dawn does not recall going anywhere else that night before retiring for the evening. (tr. 2-88)

During the visit Dawn and Damien went to dinner and then dancing with Des, Marc Dorman, Dorman's girlfriend and Bob Curley.(tr.2-87) Other than the dinner she never saw Damien meet with any of the other people involved in the smuggle while she was there. (tr.2-89) She did not see the boat or marijuana while she was there. (tr. 2-89) Dawn was basically vacationing and Damien was with her most of the time. (tr.2-90) Dawn learned that Damien had succeeded in obtaining the load of marijuana for the boat.(tr.2-90) Dorman was going to be the pilot.(tr.2-90) Damien did not tell Dawn what he did with the money.(tr.2-90) It was kind of unsure as to whether the source of marijuana was going to be Des or Bob and Damien did not tell Dawn anything different before Dawn left Jamaica. (tr.2-90) Damien said

he could leave now because everything was set to go. (tr.2-90)

Dawn Rexroat Connolly's passport (government exhibit 21 in evidence) is stamped with entry into Jamaica on July 7, 1988 and exit from Jamaica and entry at O'Hare, Chicago on July 11, 1988.(tr.2-101)

Robert Curley's passport Defendant's exhibit 102 in evidence shows entry to and exit from Jamaica in June 1988 and no stamps for July 1988.

In 1988 Damien Connolly got David Van Arsdale to drive to North Carolina to pick up the marijuana from Jamaica. (tr. 1-182) This was not the first time that David Van Arsdale transported marijuana for Damien Connolly. In 1983 Damien Connolly offered David Van Arsdale Seven or Eight Thousand dollars to transport a large quantity of

marijuana. (tr. 1-157) On that occasion he drove a rented U-haul from Madison to Beaufort, North Carolina had it filled with marijuana and drove it back to Madison, Wisconsin. (tr. 1-158) Another driver and the skipper of the boat were also involved.(tr.1-159) The skipper was Diver (1-159). The other driver was Russell Habeck.(tr.1-159) Jeb the harbor master was also involved.(tr.1-162)

In 1986 or 1987 Damien asked David Van Arsdale to drive an RV to North Carolina and back (tr. 1-165-166) In North Carolina after the ship arrived Damien Connolly and others put hundreds of small bricks of marijuana in the RV.(tr. 1-169-170) After they got to Madison they took the marijuana to Randy Freidel's house (tr.172). The RV was registered in Van Arsdale's name (tr. 1-

172-173).

Sometime in June of 1988 Damien Connolly contacted David Van Arsdale about the possibility of assisting him in his marijuana smuggling. (tr. 1-181) Damien Connolly, Tom Morgan and David Van Arsdale drove the RV form Madison Wisconsin to Beaufort, North Carolina (tr.1-186) When they got to Beaufort the marijuana was already in the area. (tr. 1-189) Damien told David Van Arsdale that the skipper of the boat was Marc Dorman and that the harbor master was Jeb. (tr.1-192) Damien said to Van Arsdale that the marijuana was going to be from Jamaica. (tr.1-192) Damien Connolly said that Bob Curley was going to be possibly arranging for this Jamaican marijuana.(tr. 1-192) Damien Connolly told Van Arsdale that Mr. Curley's role was possibly or it was an

arranger between the local Jamaican people and having it--make sure it was on the boat.(tr.1-194)

After the RV was loaded Damien Connolly flew to Madison. Damien and Dawn Connolly were staying at Tom Morgan's residence while Tom was driving back from North Carolina. (tr.2-103) Tom Curley and another man came to the residence. (tr.2-105) He was visibly angry. (tr. 2-105) Either he or the man slammed a black case on the counter and opened it and it contained a gun.(tr.2-105) Damien said the gun was an Uzi.(tr.2-151) Damien rushed Dawn into a different section of the house and told her to stay there. (tr. 2-105) The person with Robert Curley was a black male in his thirties with long hair and Damien thought his name was Wrench. (tr.2-105) Dawn could not hear

specifically what Curley, Wrench and Connolly were saying. (tr.2-106) They were pretty much yelling--they were angry. It wasn't like friendly tones.(tr-2-106) Bob Curley was demanding. (tr. 2-106) The angry exchange of voices lasted for ten or fifteen minutes. (tr.2-107) It related to the marijuana smuggle.(tr. 2-107) Damien told Dawn that Curley pulled a gun on Damien and demanded money from him immediately. (tr. 2-107) After Wrench and Curley left Damien was frantic to try to figure out how he could collect this money by one o'clock the next day.(tr.2-108) The amount of $100,000 was being demanded for payment because the marijuana had then reached U.S. soil and so Bob Curley was demanding payment for the Jamaican side.(tr.2-108) The marijuana had not

reached Madison to Dawn's knowledge.(tr.2-108) Damien was going to raise the money. He was going to phone Houden immediately.(tr.2-108) He made a phone call to Chris Houden asking him for the money which he needed by one o'clock that afternoon because he had been threatened. (tr.2-109) Dawn and Damien made arrangements to pick the money up on the west side of town near Chris Houden's house.(tr-109) Dawn can't remember the specific amount.(tr.2-109) They had all the money gathered and they had all the money ready to be delivered by one o'clock. (tr.2-110)

Tom Morgan and David Van Arsdale drove the RV full of marijuana to Madison and parked it at Randy's house. (tr. 1-199) They arrived about August 12th or 13th (tr.1-222). Damien and Dawn Connolly where there when Van Arsdale

arrived at Randy's.(tr. 1-199) There was an immediate concern of getting money, of getting money seemed to be on Damien's mind.(tr.1-201) Damien told Van Arsdale that his concern for money was that Robert Curley was being persistent into having some money for payment of the marijuana.(tr.1-201) Damien was stressed.(tr.1-201) Van Arsdale went to several locations with Dawn and Damien. (tr. 1-202) He was making phone calls trying to collect money.(tr.1-202) They went to 2 locations the White House and a restaurant by the--Nautical.(tr.1-203) They traveled around making phone calls trying to raise money 2 two and a half, three hours.(tr.1-203) He was very worried about the Rastafarian.(tr.1-203) Around 11:30 Van Arsdale, Dawn and Damien drove to John Connolly's apartment on Wilson Street. (tr.1-204)

John Connolly and Randy were there.(tr.1-204) During the 30 to 45 minutes that Van Arsdale was present there were several highly stressed discussions about the money or the Rastafarians. (tr.1-205-206) Van Arsdale went to the Echo Tavern about four blocks away.(tr.1-206)

Dawn recalls that Damien and she went to the west side of town near Chris Houden's house to pick up the money.(tr.2-109) The money was packaged in a brown paper bag. (tr.2-109) Damien delivered the money to Wrench and Curley.(tr.-110) Dawn did not see him deliver the money. She just dropped him off and that's the last she saw.(tr.2-110)

In the week that followed the payment of the money Dawn did not see Bob Curley again.(tr.2-118) Damien told

Dawn that Bob Curley told Damien that it was all show to impress the Jamaicans.(tr.2-119)

Damien told Dawn that he stood to gain $100,000 through the smuggle. (tr.2-120) She could not recall exactly but he did not get $100,000 himself.(tr.2-120) Dawn seemed to recall that Damien said that Curley got $100,000. (tr.2-120-121)

Van Arsdale claims that Dawn gave him a brown paper bag(tr.1-207) Dawn dropped him off at the side entrance to John Connolly's apartment. (tr.1-208) Van Arsdale just walked in and Bob Curley was there and no one else was there. (tr.1-208) Van Arsdale handed him the bag and said here you go.(tr.1-209) Curley dumped the money on the floor and started counting it (tr.1-211) Van Arsdale went to the refrigerator to get

a beer.(tr.1-211) Van Arsdale saw approximately 15, 20, 30 bundles. (tr.1-212) Curley counted out a certain amount of money and said it was for himself.(tr.1-212) He put the money in an open gym bag. (tr.1-212) Van Arsdale saw a hand gun in the gym bag.(tr.1-213) The brown bag and the money wound up in the gym bag. (tr.1-213) Van Arsdale left met Dawn outside and they drove back to the Echo Tavern.(tr. 1-214)

No evidence was offered that Robert Curley had anything to do with the marijuana after it left Jamaica or after it landed in North Carolina.

Petitioner argued in a Motion for New Trial that his stake in the venture instructions should have been given. The motion was denied. The appeal and this petition followed.

REASONS FOR GRANTING THE WRIT

I.

In United States v. Falcone 109 F 2d 579, 581 (2d Cir. 1940) the Second Circuit held that an alleged conspirator "...must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders." 109 F 2d at 581 see also United States v. Zeuli 137 F 2d 845, 847 (2nd Cir. 1943) and United States v. Peoni 100 F 2d 401 (2nd Cir.1938).

In the present case the 7th Circuit squarely rejected a requirement that the government prove that a conspirator have a stake in the venture. The court

held:"Curley next complains that he was entitled to receive an instruction informing the jury that it may not convict him unless it found that he had a `stake in the venture'. That is, Curley could not be found guilty unless his compensation depended on Connolly's successful retail distribution of the marijuana. ... The law does not require the government to prove that a defendant had a stake in a drug distribution venture to gain a conviction for conspiracy. Direct Sales co. v. United States 319 U.S. 703, 713 (1943). That a defendant had a stake in the success of the venture is simply one method among many of proving participation in the conspiracy. Id.

The cases are replete with circumstances in which defendants have been convicted of conspiracy by

performing tasks unrelated to selling drugs on the street. An obvious example is the mule who transports the drugs from one part of the country to another. See, e.g. [United States] v.Donovan, 24 F 3d [908] at 914 [(7th Cir. 1994)]. Curley's case is another example." (slip opinion at pages 5-6)

Curley was entitled to a stake in the venture instruction because he did not agree to help Connolly distribute marijuana. Here Robert Curley had nothing to do with the marijuana after it was on the boat. Curley's compensation was not contingent on the sale of the marijuana after it arrived in the United States. Curley did not agree with Damien Connolly to help him distribute marijuana in Madison Wisconsin. Curley demanded payment before the marijuana arrived in Madison.

From the time that the marijuana was on the boat in Jamaica Curley and Damien Connolly were adverse and not working together. Curley had no stake in the venture. The theory of the defense case was that Curley may have facilitated the transfer of marijuana form the Jamaicans to Connolly for a fee to come out of the Jamaican's side of the purchase price, but he did not agree with Connolly to distribute marijuana. To test the essence of the charged conspiracy Curley was entitled to a stake in the venture instruction.

This court should grant certiorari to resolve the conflict between judge Learned Hand's view of the essence of conspiracy (2nd Circuit) and judge William Bauer's view (7th Circuit).

CONCLUSION

For the foregoing reasons petitioner asks the court to grant certiorari to the United States Court of Appeals for the 7th Circuit to review the petitioner's conviction.

Respectfully submitted,

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